GANDA EDIBLE OILS SDN. BHD.

v.

TRANSGRAIN B.V.

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
MOHD. AZMI SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 378 OF 1986]
1 AUGUST 1987

ARBITRATION: *Appellant applied to High Court to set aside arbitrator's award - Ground for application - Award was bad on face of award - Reference involved both questions of law and fact - Whether High Court can review award.*

TRADE AND INDUSTRY: *Custom - Meaning of "custom of trade" - Finding as to what the custom was - Basis of arbitrator's finding.*

CONTRACT: *Waiver - Right to reject goods may be lost by waiver or by acceptance - Whether acceptance of documents and acceptance of goods are separate acts - Unreasonable and inordinate delay - Whether implied acceptance and/or waiver of right to reject - Question of bar to reject goods.*

This was an appeal against the order of dismissal by the High Court of the appellant's application which sought to set aside the arbitrator's award dated 28 June 1986 or, alternatively, for it to be remitted for reconsideration by the same arbitrator or for consideration by such other arbitrator as the parties may agree. The ground for the application was that the award was bad due to an error of law and/or fact on the face of the said award.

On 24 January 1984 the appellant entered into a F.O.B. contract in writing with the respondent for the purchase of 500 metric tons of palm oil and it was agreed *inter alia* that any dispute arising out of and in connection with the said contract shall be submitted to arbitration. Differences arose between the parties and pursuant to the said provision of the contract, one Lim Lee Hock was appointed by mutual agreement as arbitrator. In his findings based on the submissions and documentary evidence submitted by the Counsel for both parties, the arbitrator made an award in favour of the claimant/respondent.

Held:

[1] In the absence of any proof expressly or by implication as to the particular custom being a part of the agreement which in turn was neither disputed nor exhibited in the record before the Court, the learned Judge was wrong in concluding that the arbitrator based his finding on custom of trade.

[2] The arbitrator had in fact considered all the relevant evidence and had not made wrong inferences of fact. The arbitrator had also construed ss. 37 and 42 of the Sale of Goods (Malay States) Ordinance 1957 correctly in the light of the facts and surrounding circumstances of the case. The arbitrator did not proceed illegally either by deciding on inadmissible evidence or applying wrong principles of construction which the law does not recognise.

[3] There was nothing wrong in the arbitrator's conclusion that there was implied acceptance of the tender and/or a waiver of their right to reject the tender after such unreasonable and inordinate delay. It would not be fair or just to allow the appellant to reject the tender because by letting a reasonable time go by, the appellant has lost his right to reject.

[4] The learned Judge did not err in holding that there was no error of law on the face of the arbitration award. The appeal was dismissed with costs here and the Court below.

[Appeal dismissed with costs.]

Cases referred to:
Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210
Panchaud Freres S.A. v. Et. General Grain Co. [1970] Lloyd's LR 53

Legislation referred to:
Sale of Goods (Malay States) Ordinance 1957, ss. 37, (1), (4), 42

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 2 & 12, pp. 4, 30, 33, 334, para. 623
Salw of Goods, Benjamin, 2nd Edn., p. 955, para. 1771, p. 1004, para. 1849, pp. 927, 1004, para. 1722 & 1850

For the appellant - Ong See Seng (Cheong May Fond with him); M/s. Mah-Kok & Din
For the respondent - Cecil Abraham; M/s. Shearn Delamore & Co.

JUDGMENT

Syed Agil Barakbah SCJ:

This appeal is against the order of dismissal by the High Court Judge of originating motion at the instance of the appellant to set aside the arbitrator's award dated 28 June 1986 or, alternatively, for it to be remitted for reconsideration by the same arbitrator or for consideration by another arbitrator as the parties agree.

On 24 January 1984, the appellant entered into a F.O.B. contract in writing with the respondent for the purchase of 500 metric tons of palm oil and it was agreed *inter alia* that any dispute arising out of and in connection with the said contract shall be submitted to arbitration. The material details of the contract as accepted by the arbitrator are as follows:

Contract reference:	GEO/RBD PO M0012p/84 (Matthes & Porton Kuala Lumpur MANDPKL/RDM 9122).
Product:	Malaysia Refined. Bleached & Deodorised Palm Oil.
Quantity:	500 metric tons, bulk, 2% more or less at buyer's option to be declared at time of vessel nomination.
Shipment:	March 1984.
Price:	US$1065 per metric ton, FOB Port Kelang/Pasir Gudang/ Butterworth in seller's option to be declared 30 days before shipment month.
Weight Analysis:	Shipped weight/shipped quality final.
Payment:	CAD in Kuala Lumpur/Singapore or documents by-pass to third parties on mutual agreement.
Other conditions:	As per PORAM standard FOB sales contract 1 January 1984.

Differences arose between the parties and pursuant to the said provision of the contract, one Lim Lee Hock was appointed by mutual agreement as arbitrator. The respondent as claimant/seller submitted its claim by letter dated 26 September 1985 and the appellant as respondent/buyer in turn submitted its points of Defence dated 29 October 1985. The following points in dispute are noted by the arbitrator:

> The claimant claims that the respondent in the string should accept the claimant's tender and documents and pay for them and that the respondent wrongly declares the claimant in default. Whereas the respondent contends that a string has never been established because
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> (a) there was no mutual consent of all parties, and
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> (b) the first leg of the string was contracted on a different contract i.e., Poram FOB Contract 1 July 1978
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> The respondent also contends that they have acted correctly, relying on s. 37(1) of the Sale of Goods (Malay States) Ordinance 1957 ("SGO") and clause 1 "Quantity" of the Poram FOB Contract 1 January 1984
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> The respondent further contends that the claimant having been in default cannot subsequently proceed to propose circle settlement on the same contract and besides, the Poram FOB Contract 1 January 1984 also requires mutual consent by all parties concerned before a circle is considered to have been established.

In his findings based on the submissions and documentary evidence submitted by the Counsel for both parties, the arbitrator made an award in favour of the claimant, i.e., the respondent in the present appeal. Subsequently on 4 March 1986, the appellant filed the originating motion stated above to the appellate and special powers division of the High Court at Kuala Lumpur to set aside the arbitrator's award or, alternatively, the remission of the award for reconsideration by the arbitrator or such other arbitrator as the parties may agree. The ground for the application was that the award was bad due to an error of law and/or fact on the face of the said award.

The learned Judge after hearing the arguments of Counsel for both parties made on the same day the following ground of decision which is sufficiently short enough for its full inclusion in this judgment:

> **In Open Court before Harun J on 10 September 1986**
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> **Grounds of Decision of Mr. Justice Harun Hashim**
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> Finding: Buyer had option to reject or accept the tender.
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> Trading in palm oil is by telexes.
>
> Arbitrator has held that custom of trade acceptance or rejection must be immediate.
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> Fact that buyer had to formally reject shows that he had to reject the tender.
>
> Cannot now rely that he was not contractually bound to accept or reject short-shipment.
>
> Whether s. 42 SGO applies or not in this case is immaterial as arbitrator by para. 9 of the Award clearly relying on custom of trade.
>
> No error of law on the face of award.
>
> **Order**
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> Application dismissed with costs.

It was submitted that the learned Judge erred in holding that the arbitrator in making the award relied on the custom of trade. Clearly in the arbitration award (p. 42 of the appeal record), the arbitrator applied s. 37(1) of the Sale of Goods (Malay States) Ordinance 1957 ("SGO") and read it with s. 42 SGO. The sequence of events as noted by the arbitrator in his award explained the reason for his doing so:

> On 29 March 1984 the claimant tendered to the respondent 481.410 metric tons of RBDPO shipped on MT "BOW SKY" stowage 3 STB B/L No.PKL-RDM-1 dated 29 March 1984 in fulfilment of the contract.
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> The respondent tendered same to the respondent's immediate buyer per telex 5274 dated 29 March 1984 adding in the front "recvd flwg fm one slr trgrain which pls treat as cmng fm us" and concluding "Pls confirm whether abv tender is in order n acceptable to u".
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> On 13 April 1984 the respondent declared the claimant in default by reason of short shipment. The respondent relied on Clause 1 "Quantity" of the Poram FOB Contract 1 January 1984 and s. 37(1) of the SGO.

Section 37(1) SGO states:

> Delivery of wrong quantity.
> Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate

Section 42 reads:

> Acceptance.
> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

The arbitrator concluded that the appellant had accepted the goods by acquiescence basing on their telex reference 5274 dated 29 March 1984 which, in his view, implied that the appellant had already taken possession of the tender from the respondent. Secondly, he held the appellant's rejection on 13 April 1984 on ground of default by short shipment, made about fifteen days from the receipt of tender from the claimant and about eight days from their telex dated 6 April 1984 stating their inability to accept the tender documents pending acceptance from their immediate buyer Sun Edible, was unreasonable. Lastly, he also concluded that in the absence of rejection within reasonable time, the appellant was not only in a position to reject the respondent's tender and default them for short shipment.

At para. 9 of the award, the arbitrator wrote:

> A buyer in receipt of a bad tender must decide immediately to accept or reject the same. If a buyer could accept or reject after 8-15 days there would be chaos in the trade. Clearly this cannot prevail.

That was the passage that led the trial Judge to conclude that the arbitrator in making the award relied on custom of trade, and in the circumstances therefore it was immaterial whether s. 42 of SGO applied or not.

It was submitted by the Counsel for the appellant that the arbitrator could not be relying on custom of trade without making a finding as to what the custom was. The learned Counsel for the respondent conceded that the issue of custom and usage was not contended by either party before the arbitrator. He further submitted that the arbitrator could have relied

on the facts and circumstances of the case without the necessity of resorting to ss. 37 and 42 of SGO. We are of the view that the passage at para. 9 cannot by itself alter the arbitrator's ground based on the provision of the SGO into that of custom of trade. He was only expressing his view based on the facts and circumstances of the case as described in the preceding paragraphs of his award, of the effect of unreasonable delay in rejecting the tender.

One has to understand what is meant by "custom of trade" before dealing with the subject. A custom is a particular rule which has existed either actually or presumptively from time immemorial and obtained the force of law in a particular locality. It is distinguishable from particular trade or local usages which have been imported as express or implied term into commercial or other contracts.

No doubt s. 37(4) of SGO makes the provisions of the section to be subject to any usage of trade, special agreement or course of dealing between the parties. The arbitrator may apply his own knowledge of the usage, but before that can be done, there must be sufficient material for its inclusion. It follows that where persons execute a contract under circumstances governed by usage, the usage when proved, must be considered as part of the agreement. In general, every usage must be notorious, certain and reasonable and must not offend against the intention of any statute. By notorious, it means that it has acquired such notoriety in a particular branch of trade or business or amongst the class of persons who are affected by it, that any person who enters into a contract affected by the usage, must be taken to have done so with the intention that the usage should form part of the contract. By certainty, usage is required to be as certain as the written contract itself. It must be uniform and reasonable before it can be imported into a contract. (*Halsbury's Laws of England*, 4th Edn., vol. 12, pp. 4, 30 and 33). In the light of the above, we agree that the subject of custom of trade or usage was never an issue in the arbitration case. In the absence of any proof expressly or by implication as to the particular custom being a part of the agreement which in turn was neither disputed nor exhibited in the record before us, we are of the view that the learned Judge was wrong in concluding that the arbitrator based his finding on custom of trade.

It was also contended by the appellant that the trial Judge erred in law by holding that there was no error of law on the face of the arbitration award. In fact as stated earlier that was the ground on which the application to the Judge was based. The principles that have to be applied in the instant case may be set out as follows:

> An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
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> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the Court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award."
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> (*Halsbury's Laws of England*, 4th Edn., vol. 2, p. 334 para. 623 "Error of law on face of award").

A distinction should be drawn between a case where a dispute is referred to an arbitrator in which a question of law becomes material from the case in which a specific question of law has been referred to him. The position is that in the former case the Court can interfere if and when an error appears on the face of the award but in the latter no such interference is possible upon the ground that the decision on the question of law is an erroneous one. (Per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210, 211). In that case, no question of law was referred to the arbitrator but what was submitted was a question of law which incidentally and necessarily arose in applying certain facts. In our considered judgment in the present appeal, a similar situation arose. It is clear that in applying certain facts which led to the dispute between the parties, the arbitrator had also to construe the provisions of s. 37 of the SGO which was relied by the respondent and also s. 42 which incidentally arose in applying those facts. Since the reference involved both questions of law and fact, the High Court was in a position to review the award if and when there is an error apparent on the face of the award.

The questions that should have arisen before the Judge were (1) whether the arbitrator made wrong inferences of fact from the evidence including the four telexes which were incorporated in the award and (2) whether the arbitrator had erroneously construed the two sections.

In the first place, we are satisfied that the arbitrator had considered all the relevant evidence and had not made wrong inferences of fact. As regards the second point, we are also satisfied after careful consideration that the arbitrator has construed the two sections correctly in the light of the facts and surrounding circumstances of the case. We also bear in mind that even if we could come to a different conclusion on the matter, we fail to see in the award that the arbitrator has proceeded illegally either by deciding on inadmissible evidence or applying the wrong principles of construction which the law does not recognise.

It was submitted s. 37 could not apply to the present case on the ground that goods had not been delivered to the appellant since the whole transaction was dealt with by telexes which did not come within the ambit of the Act in the absence of express intimation of acceptance. We note that the contract in question is "Poram FOB sales contract dated 24 January 1984". In an F.O.B. contract, the seller is bound at his expense to place the goods "free on board" a ship for transmission to the buyer. An F.O.B. buyer has the normal right to reject the goods if they are defective in any way that amounts to a breach of a fundamental term, or a breach of a condition, or a breach of an intermediate term which causes serious prejudice to the buyer or if the goods are not of the agreed quantity. (Benjamin's *Sale of Goods*, 2nd Edn., p. 955 para. 1771 and p. 1004 para 1849). It seems that the right to reject the goods as distinct from the right to reject the documents which are available in a C.I.F. contract can also arise in relation to F.O.B. contracts under which the seller may be obliged to procure and tender certain documents and the same principles as in cif contract will apply where an F.O.B. buyer has these two rights of rejection.

The right to reject may however be lost by waiver or by acceptance. In the case of waiver, a buyer who knows that the documents are defective takes them up without express reservation of his rights, loses the right to reject the documents. He cannot also reject the goods subsequently on the grounds that the documents were defective. On the other hand, the acceptance of the documents and the acceptance of the goods appear to be separate acts and acceptance of the documents will not necessarily bar the right to reject goods. A distinction must be drawn between defects in the goods which are apparent on the face of the documents, and those which are not. If the buyer accepts documents which on their

face indicate, for example, that the goods were shipped late he may be held to have waived his right to reject the goods on this ground, and he may lose the right to reject the goods even though he has not read the documents, so that he cannot strictly speaking be said to have waived the right to reject, since waiver requires actual knowledge of the facts giving rise to the right to reject. On the other hand, the buyer could still reject the goods after accepting the documents if the goods suffered from a defect which did not appear on the face of the documents. (Benjamin's *Sale of Goods*, pp. 927 and 1004 para. 1722 and 1850).

In the present appeal, the undisputed facts were that the tender documents clearly state the amount of 481.410 metric tons of palm oil shipped on "MT BOW SKY stowage 3 STB B/L No. PKLRDM-1 dated 29 March 1984 in fulfilment of the contract". The agreed amount of consignment was 500 tons metric tons "2% more or less as the buyer's option to be declared at the time of vessel nomination". The allowable amount can be either 510 or 490 metric tons, no more and no less. There was therefore clear shortage of the amount which would have attracted the attention of the appellant or the direct purchase on receipt of the telex documents, and to reject the same without any reasonable delay on the ground of short shipment if they really intended to exercise their right of rejection. As rightly noted by the arbitrator, it took the appellant eight days from the date of tender to inform the respondent that they were relying on their direct buyer whether to accept the tender or not, and fifteen days to inform the respondent of their rejection. Applying the principles stated above, we cannot see anything wrong with the arbitrator's conclusion that there was implied acceptance of the tender and/or a waiver of their right to reject the tender after such unreasonable an inordinate delay. It would not be fair or just to allow the appellant to reject the tender because by letting a reasonable time go by, the appellant has lost his right to reject. (*Panchaud Freres S.A. v. Et. General Grain Co.* [1970] Lloyd's LR 53, right column). In our judgment, the Judge did not err in holding that there was no error of law on the face of the arbitration award.

The appeal is dismissed with costs here and the Court below.

Also found at [1987] 2 CLJ 394